To be argued by
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Supreme Court of the United States

October Term, 1959

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No. 497

WILLARD H. PHILLIPS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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Opinion Below

The decision of the Court of Appeals of the State of New York unanimously affirming the judgment of conviction entered against the petitioner in the County Court of Nassau County on October 17, 1958 for the crime of Murder in the First Degree is reported *sub nom. People* v. *Phillips,* at 6 N. Y. 2d 788. No opinion was rendered by the Court of Appeals upon its decision.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1959 (R. pp. 504-505). On June 25, 1959 that Court unanimously denied an application for reargument, without opinion, but amended the remittitur by reciting that, in

affirming the judgment of conviction, the Court had necessarily passed upon questions under the Constitution of the United States as to whether the petitioner's confessions were voluntarily given and whether the taking of such confessions constituted denial of due process of law under the Fourteenth Amendment (R. pp. 505-506). Such denial of reargument and amendment of remittitur are reported at 6 N. Y. 2d 882 and 6 N. Y. 2d 881, respectively. Petition for writ of certiorari was filed on August 24, 1959 and was granted on October 26, 1959. The jurisdiction of this Court rests upon 28 U. S. C. Section 1257, subd. 3, and 28 U. S. C. Section 2106.

Question Presented

Whether the rights of petitioner, under the Fourteenth Amendment to the United States Constitution, were violated by the admission into evidence, at his trial, of confessions voluntarily given by him during prearraignment interrogation.

Constitutional Provisions and Statutes Involved

United States Constitution Amendment XIV:

Section 1.

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Constitution Article I, Section 6:

> "No person shall be held to answer for a capital or otherwise infamous crime * * * unless on indictment of a grand jury, * * *."
>
> "No person shall be deprived of life, liberty or property without due process of law."

New York Code Criminal Procedure Section 251:

> "The grand jury ought to find an indictment, when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury."

New York Code Criminal Procedure Section 395:

> "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

Statement

Petitioner was found guilty, after trial by jury, of the crime of felony-murder. As the jury did not recommend leniency, the petitioner was sentenced to death. The following are the facts upon which the conviction and sentence are founded:

The Crime

Sunday Graham, an 8 year old Negro girl, left her home in Hempstead, New York at about 8:45 A. M. on Monday morning, May 12, 1958, to attend Our Lady of Loretto Roman Catholic school (91, 93).* Her foster mother, Mrs. Mynita Graham, visited Sunday at the school that day about 2:00 P. M. (89, 103). She never again saw her child (105).

When Sunday failed to arrive home, after leaving school about 2:45 P. M. (178), Mrs. Graham retraced her

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* Unless otherwise indicated, numbers in parentheses refer to folios of printed record on appeal to New York State Court of Appeals.

daughter's route to the school, questioned one of the Sisters (108) and finally, at about 5:30 P. M., notified the Hempstead Police Department (108, 109, 171). They organized a search and, when this failed to locate Sunday, they sent, at about 10:15 P. M. that evening, a missing person alarm to the Nassau County Police Department (172-174).

Between 4:00 and 5:00 P. M. the following day, May 13, 1958, Sunday's body was discovered behind a warehouse in Garden City, a nearby community also in Nassau County (359-360, 365-366, 372, 374-375, 420, 458). A post-mortem examination of the child's body revealed that her hymen and vaginal tract were torn and lacerated as a result of having been raped (391-392, 486, 525). She had been smothered to death with her own underpants which had been forced tightly down her mouth and throat and her belt was found wrapped around her neck (388-389, 394-395).

The Petitioner

Willard H. Phillips, a Negro, was a 42 year old unemployed electronic repairman (27) at the time of the crime (26, 27, 669). He is a high school graduate (27, 678) with an above average intelligence quotient of 111 (920). After the first of his two marriages ended in an annulment, he married Mynita Graham, Sunday's foster mother (688). This second marriage terminated in a divorce in 1944 (691). In 1945, the petitioner was inducted into the U. S. Navy and received an honorable discharge after approximately four months' service.

In 1947 he was convicted, after trial, of stabbing and raping a 17 year old girl and was sentenced to 10 years imprisonment (705-708). He had never before confessed raping this girl and had, in fact, sworn innocence throughout his testimony upon his former trial (782-785). He was released on parole in 1952 (708), but two months later

he was recommitted to prison because he had molested a 5 year old girl (710-711). He also confessed to his psychiatrist that he had raped approximately twenty-five other women (861-862).

After his final release from prison in 1956 (711), Mrs. Graham again became his paramour (111, 148-149, 712). Four days before the murder Mrs. Graham terminated her relationship with the petitioner (111-114), and he threatened that he would "get even" with her (114, 116).

The Detention and Questioning of the Petitioner

Following receipt of the report of Sunday's disappearance, Detective Rofheart, from the Third Precinct of the Nassau County Police Department, obtained a description from her foster father, spoke with Mrs. Graham at her home and then began to search the area (231-233). The following morning, May 13, 1958, he, and another detective, interviewed Sunday's classmates at her school and then went to the petitioner's home in Hempstead (234-237). They found there a cap and jacket similar to those worn by the driver of the car that Sunday had been seen entering the previous afternoon (187-191, 237-238). Rofheart also learned that the petitioner's car was similar to the one observed by Sunday's classmate (188, 245).

The two detectives then asked the petitioner to come to the Third Precinct police station in Williston Park and the petitioner voluntarily accompanied them (238, 246, 253). They arrived at the precinct at about 1:15 P. M. (247, 284) and the petitioner was questioned only by Rofheart from about 1:30 P. M. to 2:30 P. M. (255). Rofheart typed up the petitioner's wholly exculpatory statement concerning his activities the previous day (251-255). About 3:00 P. M. the petitioner read and signed this statement (251, 255-257, 1339-1347).

About 4:00 P. M. the police were notified that the violated body of a young Negro girl had been found in Garden City (258). Rofheart then resumed questioning the petitioner "not continually but on and off" until about 6:30 P. M. (258). Lieutenant Curran, Sergeant Owens and Detective Diggs also spoke with the petitioner for short periods between 3:00 and 6:30 P. M. while other detectives went out to investigate the petitioner's statement (300-302, 306-307). At about 6:30 P. M. Detective Stark of the homicide squad arrived to take charge of the case and was briefed by Rofheart for approximately 30 minutes (260-261, 313-314, 553).

At about 5:00 P. M. the Nassau County Police were informed that the dead child was Sunday Graham (332). Until the time Sunday's body was discovered the police would neither have arrested the petitioner nor restrained him if he had wished to leave (329, 331). The discovery of the child's body altered the purpose of the investigation. No longer was a missing child sought—information to solve a murder was thereafter the object.

When the body was identified at 5:00 P. M., Detective Rofheart suspected the petitioner was responsible, but he did not believe the proof was sufficient to formally charge petitioner with any crime (291, 350-351). From this time on, however, petitioner would have been arrested if he had attempted to leave (341, 588) as the police felt that basis existed for further investigation in the form of laboratory tests and resolution of the discrepancies in the petitioner's statement (589-594).

Accordingly, shortly after 7:00 P. M., Dr. Leslie Lukash, the Nassau County Medical Examiner, and Inspector Pribyl, Supervisor of the Police Laboratory, came to the stationhouse (461, 555) in order to conduct the laboratory tests, i.e., washing of petitioner's penis with a sa'ine solution, examination of his clothing and the taking of fingernail scrapings (462). The petitioner was reluctant to con-

sent to these tests and he was told that he was under no obligation to submit to them (410-413). After Inspector Pribyl had demonstrated, by drinking the saline solution, that the tests were harmless, and had explained that, if the petitioner were innocent, he had nothing to fear from the tests, the petitioner gave his consent and the tests were performed. Subsequent analysis of the specimens showed there was neither sperm on his penis nor blood on his fingernails (469-470). No seminal staining was found on petitioner's underclothing (473), but unidentifiable blood stains were found (473, 475). The tests conducted by Dr. Lukash and Inspector Pribyl were concluded about 8:00 P. M. (558).

Detective Rofheart had asked the petitioner, at about 6:30 P. M., if he wanted something to eat (260-261, 302). Detective Stark, when he went out for supper at 8:00 P. M., also asked the petitioner if he wanted to eat (263). On both occasions the petitioner declined to have anything to eat (260, 263, 335). While Stark was at supper, the petitioner remained with Rofheart who did not question him (263).

Shortly after 9:00 P. M. Captain Closs arrived and he questioned the petitioner until approximately 10:00 P. M. (264). At about 10:30 P. M. Mrs. Graham came to the precinct, talked first with Stark and then spoke privately with the petitioner for about twenty minutes (266, 560-561). Stark again offered food to the petitioner but it was declined (561). Following this, Mrs. Graham's brother, Curtis Maddox, also spoke privately with the petitioner for approximately 30 minutes (267, 563). Rofheart left the precinct at about 1:30 A. M. (268) and Stark and Lieutenant Cummings questioned the petitioner for about an hour until 2:30 A. M. (564-565). They had first offered to bring food to the petitioner but he still refused it (564).

Shortly after 3:00 A. M. the petitioner, Stark and Lieutenant Cummings went to Nassau County Police Headquarters in Mineola (566, 610). Upon arrival there the

Chief of Detectives, Stuyvesant Pinnell, sent out for sandwiches, but when the food was offered him the petitioner again declined it (567). Chief Pinnell, in the presence of Inspector Lada, Cummings and Stark, then questioned the petitioner for approximately an hour (567-568, 611). Another hour passed while the police reviewed the case with Assistant District Attorney William Cahn while Stark remained with, but did not question, the petitioner (568, 613).

The Confessions

Assistant District Attorney Cahn began to question the petitioner at 5:10 A. M. in the presence of Curran and another Assistant District Attorney (1385-1386). A stenographic record (1384-1461) of the entire conversation was made by a court reporter who came to police headquarters sometime after 4:15 A. M. (538, 542). At the outset the petitioner gave a detailed account of his activities on May 12, 1958, specifying the times and places of his travels throughout the day, his search for work, his purchase of a phonograph record and his conversation with Mrs. Graham when he volunteered to join in the search for Sunday (1396-1428). Examination of this portion of the statement reveals very clearly that the petitioner not only was not ready to confess—but was alert to avoid making any incriminating admission whatever (1391, 1394, 1414, 1421).

The petitioner was articulate and positive in all his answers—which hadn't changed since his statement to Detective Rofheart that afternoon (cf. 1339-1346). Not once did he refuse to answer, request any attorney or advice or complain of any kind of ill-treatment (1387-1430). Moreover, his recollection of a mass of detail was prompt and spontaneous. A reading of his answers (e. g. 1421) shows that he discussed the events of the previous day with complete confidence.

However, when he was asked what he had done after he picked Sunday up at her school, the petitioner gave no

answer (1430-1431). Instead, he asked to see Chief Pinnell, Inspector Lada, Sergeant Cummings and Detective Stark (1432). He stood up and shook hands with each one of the police officers as they entered the room (738, 1433-1434). While shaking hands with Inspector Lada the petitioner told him that he was now telling the truth and the Inspector assured him that he was doing the right thing (1435).

Once more, the petitioner was offered coffee which he again refused (570, 1435). The petitioner, who is Roman Catholic (27), blessed himself (1461) and then gave a full statement as to his raping and strangling the child (1437-1461). The first confession was completed at 6:00 A. M. (1461). Starting at 6:05 A. M. Detective Stark typed a further statement which the petitioner read and signed at 6:40 A. M.

After the petitioner had completed his statement to Detective Stark, he asked to see a Catholic priest; Father John Cochran came to police headquarters and conversed privately with the petitioner (573-574). The petitioner was then placed in detention at headquarters until he was arraigned in the Nassau County District Court at 10:00 A. M. (574). Following the arraignment, the police asked the petitioner to show them the various locations involved in the crime. The petitioner agreed and they drove to the locations where the petitioner had first waited for Sunday, where he had raped and killed her, and where he had disposed of her body (574-576). While at the scene where the body was found, the petitioner led the police to where he had thrown away Sunday's pocketbook (576-581).

Petitioner's Testimony Upon the Trial

In his direct testimony at the trial the petitioner reviewed the events of his life—with particular emphasis on his sexual activities (679-680, 719-723). He testified that

he had driven Sunday Graham from her school to an ice cream stand in Hempstead on the afternoon of May 12 (740-742). When Sunday began to "tease" the petitioner that her mother would not see him again (745-746), he drove her to a lonely spot near a golf course and threatened the child that, if she didn't tell him what her mother had said, he would play with her vagina (751-753). He knew that the child was "sensitive about even mentioning" her private parts but he wanted "to determine whether she was actually told the things she was telling me" (754).

He dragged her into the back seat of his car and began "playing with her" (754). The child resisted him, fought and screamed as he took her panties down (755). He testified that the next he remembered was that her body was between his legs and he was holding her belt, which was wrapped around her neck (755). He wiped the sperm discharge off her dress (756) and, when he saw that she was dead, he put the body on the back seat of the car (757-758).

He drove to Mineola to keep an appointment for a job application and arrived there about 5:00 P. M. (760-763). After filling out the application (764), he then disposed of the body, exchanged the phonograph record he had purchased the day before and went to dinner in a restaurant (766-769). His direct testimony concluded with his account of his telephoning Mrs. Graham and volunteering to join in the search for Sunday (770-771).

Not once during his entire direct testimony did the petitioner indicate that he had ever been threatened, struck, deceived, coerced, or forced, in any manner, to confess. He did not deny raping and strangling Sunday Graham nor did he repudiate his confessions. In fact, he confirmed that he had requested to shake hands with each of the police officers—and that he was questioned by the Assistant District Attorney for almost an hour—before he "broke down and confessed" (738-739).

During cross-examination the petitioner was asked to explain his testimony that he "had very little alternative as to what" he had stated in his confession (805). He answered that he was in a "state of shock * * * couldn't have been in a reasonable state of mind * * * after being beaten around and forced to do different things" (805). He also claimed that he "was almost in a state of brain-wash" after the police "had carried me through so much and had told me so much" (807). The petitioner denied that certain of the answers he had given in his first confession were true (796, 798, 799, 810), and he testified that he was unable to remember certain other answers he had given in his first confession (798, 801-803, 806, 812-813). He did admit, however, that he had kept Sunday's panties in her mouth "to stop her from screaming" (800). Finally, he was unable to remember—but he wouldn't deny—that he had raped and killed Sunday Graham (815).

Summary of A[illegible]

The petitioner, an experienced c[illegible]inal with above normal intelligence, well schooled in concealing his guilt, gave two entirely voluntary and truthful confessions while being questioned as a suspect in the course of an investigation into an unsolved murder. During the time he was questioned the petitioner was fairly treated, repeatedly offered food and was never coerced in any form. The confessions were not extracted by means of any brutality or duress but were motivated solely by the outpouring of a conscience burdened with guilt.

ARGUMENT

POINT ONE

As the petitioner's confessions were completely voluntary and truthful, they were properly admitted into evidence.

The petitioner, in urging this Court to reverse the judgment of conviction, claims that due process was denied him by the use of his confessions as they were not "the expression of free choice". In support of this contention the petitioner advances a number of statements concerning his confessions in an effort to compel belief that they were produced solely by "mistreatment", "coercion", and "deceptive information".

Answer to these contentions can best be found in analysis, in order, of those statements selected and utilized by the petitioner in support of his argument. As the facts in the record clearly demonstrate that the petitioner's confessions were freely and voluntarily given, the respondent will review the following principal assertions of the petitioner:

A.

That petitioner was "beaten around and forced to do different things".

While being pressed on cross-examination to explain his statement [as to why he didn't remember certain of the answers he gave in his first confession] the petitioner made one reference to "being beaten around and forced to do different things" (805). In his brief (pp. 6, 10, 11) the petitioner quotes this single phrase of testimony three times, although there is nothing in the record to show who beat him or even when or where it was supposed to have happened. Not only was this answer unresponsive, it does not constitute a fair import of his testimony.

Although, in opening to the jury, his trial counsel promised to demonstrate that the petitioner was "tortured * * * by at least 36 different officers of the Police Department" (86), not a single witness was called—not even the petitioner—to offer any proof in support of this remarkable statement.

In fact, the petitioner's counsel stated that he would take "about one week to demonstrate that [the transcript of petitioner's first confession] shouldn't go into evidence" (535). However, when the stenographer who had transcribed this confession testified that the petitioner was not ready to confess—and didn't confess—when first questioned by the Assistant District Attorney (541), counsel requested a recess to study the entire statement (542-543). Following this recess no evidence whatever was adduced to show that the petitioner had ever been struck, or beaten, or threatened. The confessions were admitted into evidence without any question being raised as to physical violence (544, 571). In his attack on the confessions, at the close of the prosecution's case, petitioner's trial counsel again made no mention of any physical violence but, instead, stressed the length of the interrogation and the "deception" practiced by the Assistant District Attorney (657-661).

In view of this state of the record, it can not reasonably be argued that beatings or threats were raised as any issue at the trial. Nor may any unfavorable inference as to this issue be drawn from the prosecution's failure to call all the police officers who questioned the petitioner as such witnesses were equally available to the petitioner, *United States* v. *Beekman*, 155 F. 2d 580 (2d Cir.), II Wigmore on Evidence (3d Ed.) § 288.

Detective Rofheart, who had the petitioner under close scrutiny continuously until 1:30 A. M. (298), and Detective Stark, who was present throughout the petitioner's questioning at police headquarters (611-612), both testified that no promises of leniency were made to the petitioner (219,

608, 615), that he was not threatened in any manner (319, 322, 327, 607), and that he was never struck (328, 607, 615, 617).

Moreover, the names of all police officers who had any connection with the investigation were well known to the petitioner and his trial counsel (302-312). Their testimony was available at all times to the petitioner if he wished. As no effort was made to adduce any such testimony, the conclusion is irresistable that no basis ever existed to support the petitioner's claim that he was threatened or beaten. Quite simply, the claim is incredible in the face of the record. Its rejection by the jury was entirely warranted.

B.

That petitioner "was stripped of his clothing and subjected to a humiliating examination of his private parts."

Petitioner seeks to equate the fact that his undercloth-ing was removed for laboratory examination with the circumstances in *Malinski* v. *New York,* 324 U. S. 401. In this effort he ignores the facts that he was immediately furnished fresh clothing and his underwear was removed, not to "humiliate" him, but only for the purpose of obtaining scientific evidence which might have exonerated him. In fact, this was the very result of the tests that were conducted. Not one of the laboratory findings could be characterized as anything but beneficial to the petitioner.

Each of the laboratory tests was performed with the full consent of the petitioner (398, 413, 468). His initial hesitancy was overcome, not by any deception or coercion as the petitioner now suggests to this Court (pp. 4-5, petitioner's brief), but by a graphic demonstration that the saline solution was harmless and by his being informed that the tests might help to establish his innocence (511, 514). Not only was the petitioner fully advised that he need not consent to the tests (413, 510), he was even invited to select

a doctor of his own choice to conduct the tests (467, 517). That his consent to these tests was willingly given (398, 413, 468) is not now denied by the petitioner.

The petitioner argues that the rationale of the *Malinski* case applies to him because he disrobed in connection with the washing of his penis and because the police retained his underwear to search for staining. What was properly condemned in the *Malinski* decision was the removal of the prisoner's clothing to exert psychological pressure during interrogation. No such facts ever occurred in this case. The petitioner was given other clothing and was not continued in any state of undress. The examinations were conducted solely to obtain impartial and objective evidence which could benefit an innocent man as well as incriminate a guilty one (515-516). As the petitioner continued, for over nine hours, to deny his guilt it is entirely unreasonable to believe that these tests were designed, or operated, to coerce him into confession.

C.

That petitioner was deprived of food and drink.

The petitioner now complains that he had no food and drink (pp. 3, 9, 12, petitioner's brief) during the period of his detention by the police but only once does he acknowledge that he was offered food (p. 12).

The record reveals the full facts. Five separate police officers offered to feed the petitioner on six distinct occasions, i.e., at 6:30 P. M., 8:00 P. M., 10:30 P. M., 1:30 A. M., 3:00 A. M., and 5:30 A. M. (260-263, 302, 335, 561, 564, 567, 570, 1435). It is undisputed that, on each of these occasions, the petitioner declined all offers of food, sandwiches or coffee. He even failed to accept cigarettes (1407, 1436).

D.

That questioning of petitioner continued long "after the police were seemingly satisfied that he was the guilty party * * * and had proof sufficient to arraign and indict."

From the time that Detective Rofheart visited the petitioner at his home until Sunday Graham's body was discovered about 4:00 P. M., the police were not conducting a murder investigation. They were trying to locate a missing child. There was no reason to believe that the petitioner was guilty of any crime—let alone that he was responsible for the death of Sunday Graham. The questioning of the petitioner up to this point, which was carried on solely by one man, Detective Rofheart, could only be characterized as intermittent and desultory.

Even then, Detective Stark and other members of the homicide squad did not begin to question the petitioner until after 9:00 P. M. that evening (264). The laboratory tests, during which the police did talk to the petitioner in general terms about the crime, were not concluded until about 8:00 P. M. (585). Rofheart did not question the petitioner while Stark was at dinner (263). Thus, the petitioner was questioned with respect to the then murder investigation for a period of approximately eight and one half hours prior to the first confession.

The petitioner recognizes the weakness of his position in contending that the circumstances and length of his detention prior to his confessions rendered them inadmissible in violation of due process. He thus seeks to enlarge the total time consumed by the "inquisition" (p. 9, petitioner's brief) by complaining of events after his arraignment, more than three hours after the confessions were concluded. Therefore, he extends the period of the "inquisition" to include his visit to the police laboratory (to identify some clothing—474), his visits to the scenes of the

crime (which he agreed to show the police—574) and his examination by Doctor D'Angelo, a psychiatrist (solely to ascertain petitioner's mental condition and not to obtain any further confession—1015).

The very factors emphasized by the petitioner in seeking to convince this court that his confession was tainted with some irregularity or involuntariness indicate that his claim is specious. Thus follow the bland assertions that "the police were satisfied that they had 'their man', * * * and believed that a confession was forthcoming provided they persevered in their 'softening-up' process" (p. 13, petitioner's brief). Neither these extravagant statements nor the quoted phrases find any support in the record.

The petitioner also questions why he was first brought to the Third Precinct in Williston Park rather than to Police Headquarters in Mineola, which was a mile nearer his home (pp. 9, 14, petitioner's brief). The simple answer is found in the record. The detectives assigned to search for the missing child were attached to the Third Precinct which included, as part of its territory, the Village of Hempstead where Sunday Graham was reported lost (174, 231, 272).

Petitioner devotes much of his brief (pp. 13-15) to an extended argument that the interrogation by the police continued after they had "proof" sufficient to indict him.

It is the law of New York that, to sustain an indictment, the legal evidence presented to the Grand Jury must, if unexplained or uncontradicted, be such as to warrant a conviction by the trial jury, Code of Criminal Procedures, Section 251, *People* v. *Lieberman,* 3 N. Y. 2d 649.

Yet, the petitioner argues that his past record (which could not be introduced in evidence against him), his relationship with Sunday's step-mother, the vague description of the automobile and its driver given by Sunday's classmate, taken together with the peanut shells found on the floor of the petitioner's automobile (which could not be

connected in any way with the peanut shells found in the victim's hair—520) would be sufficient evidence to sustain an indictment for murder.

As petitioner's trial counsel correctly argued, at the close of the prosecution's case (643-656), all the evidence introduced upon the trial—with the exception of the confessions—would not,—if taken together, justify sending the case to the jury. Petitioner's trial counsel demonstrated that the items of evidence, other than the confessions, connecting the petitioner with the crime were so tenuous and vague that they constituted a complete lack of proof of the petitioner's guilt. But the petitioner now urges that nothing more than suspicion in the minds of the police officers was sufficient to arraign him upon formal charges of murder and more than ample "proof" to obtain an indictment.

The petitioner was arraigned at the first available opportunity after the police had evidence—and not mere suspicion—upon which a charge could be founded. Both Detectives Rofheart (279, 343-344) and Stark (598) knew from past experience that the Nassau County District Court in Mineola closed each day between 4:00 and 4:45 P. M. Therefore, no magistrate was available to arraign the petitioner after this hour (347, 351). Rule I of the Nassau County District Court Rules provides:

> "Court hours. The hours of the court shall be from 10 A. M. to 5 P. M. The office of the Clerk shall be open for business from 9 A. M. to 4 P. M. each week day and from 9 A. M. to 12 o'clock noon on Saturday. * * * "

Sunday Graham's body was not identified until about 5:00 P. M. (332-333). At that time no court was open to conduct an arraignment (347) even if there was evidence sufficient to justify filing of any charges against the petitioner (351). No such evidence existed.

Truly, petitioner's association with the victim and her step-mother, and the similarity of his attire to that of the driver of the car, dictated that the police investigate his activities on the day of the crime. However, no basis, either in fact or law, existed for the police to maintain any formal charges of rape or murder against the petitioner prior to his giving a truthful statement.

The very items relied on by the petitioner in asserting that the police had sufficient proof to arraign and indict him are mutually inconsistent. On the one hand, petitioner points out that the description given by Sunday's classmate and the peanut shells found in his car pointed inexorably toward his guilt. On the other hand, the petitioner complains that "the police persisted in their questioning notwithstanding Phillips' steadfast denial of guilt and seemingly plausible alibi" (p. 14, petitioner's brief).

The enigma that confronted the police officers was the same. Although certain items seemed to indicate petitioner's complicity in the crime, "his steadfast denial of guilt and seemingly plausible alibi" effectively prevented them from making any but the most tentative of judgments. This enigma was the very explanation for the detectives being sent out to verify the petitioner's statements and also for the tests conducted by Inpector Pribyl and Dr. Lukash (592). These very efforts of the police tended to absolve the petitioner and showed that investigation of an unsolved crime was still in progress. Nothing was conclusive at the time the tests were made. Before their results could be known, petitioner himself, borne down by the enormity of his deed and stirred by his own conscience, gave his truthful and entirely voluntary confessions.

E.

That petitioner "was deceptively informed that Sunday's blood had been found on his clothing."

Petitioner claims that the Assistant District Attorney wove a deliberately deceptive web in which to entrap him when he informed the petitioner that Sunday's blood had been found on his underclothing. Although laboratory analysis on the following day could not establish that this blood was Sunday's, or even that it was human (473-475), the prosecutor's assumption—prior to laboratory analysis—was an entirely reasonable one. The child had bled to some extent (459, 485) as a result of the tearing and laceration of her vagina (391-392) and blood stains had been found on the petitioner's underclothing (473-475). Although the Assistant District Attorney did not have the benefit of the full laboratory report at the time of his questioning, it is difficult to believe that his guess as to origin of the blood operated to deliberately mislead the petitioner.

Even if it be assumed, as petitioner does, that the prosecutor was aware that his statement was false, the use of such a trick does not, of itself, exclude the confession induced thereby, III Wigmore on Evidence (3d Ed.) Section 841. As observed in *Lewis* v. *U. S.*, 74 F. 2d 173, 177 (9th Cir.):

> "False statements as to the amount of incriminating evidence against the defendant might tend to make a guilty man confess, but would not have that tendency if the man were not guilty unless the statement as to the evidence was coupled with some promise or representation in regard to the advantage to be gained by a confession, or plea of guilty."

F.

That petitioner's confession was not transcribed until after he "agreed to confess."

In striving to fit the circumstances of his detention within the ambit of this Court's decisions, the petitioner's brief contains assertions which are not in accord with the facts in the record. It is claimed, for example, that "The stenographer was not actually summoned to police headquarters until shortly before Phillips agreed to confess" (p. 14, petitioner's brief). The testimony of the court reporter—completely substantiated by the text of petitioner's verbatim statement (1384-1430)—was direct, clear and unchallenged (541-542). The petitioner had not "agreed to confess" when the Assistant District Attorney began to question him. He had given no advance indication at all that he would confess or even make any damaging admission. This fact was confirmed by the petitioner in his direct testimony: he was questioned for "almost an hour" by Mr. Cahn before he "broke down and confessed" (738-739).

This Court, in *Spano* v. *New York*, 360 U. S. 315, forbade the use of the confession obtained under circumstances where the prisoner, who had been previously indicted, persisted in his refusal to answer any questions and repeatedly sought the advice of the attorney who had surrendered him to the police. The petitioner, to the contrary, not only never refused to answer any questions, nor did he seek the aid of counsel at any time. He consistently answered all inquiries. The petitioner had considerable previous experience with the criminal law. He knew well eleven years earlier that he was under no obligation to offer any statement or explanation upon questioning by the police. In the previous rape charge, not only had he never confessed, he took the stand and denied his guilt.

Even though the petitioner's answers constituted nothing less than a web of lies, carefully and cleverly designed to conceal his responsibility for the crime, he still did not refuse to answer or make any statement. In fact, he was almost garrulous in accounting for his innocence. He gave a misleading account which sent detectives out in the field to investigate his claimed movements on the day of the murder. In this way the police sought to determine the truth and accuracy of the statements given by the petitioner. At no time did the petitioner decline to answer. His declination was to tell the truth.

G.

That statements in petitioner's "confession indicate that he was overborne by long questioning and had succumbed to and adopted the suggestions of his inquisitors."

A reading of the answers given by the petitioner, at the outset of his questioning by the prosecuting attorney, reveals that he encountered no difficulty in giving specifics as to his biography, his relations with the victim and her mother, his wardrobe or as to his automobile license number. He precisely related his activities on the day of Sunday's disappearance. It was not until the petitioner began to recount the true facts of his abduction, raping and slaying of the infant that he began to equivocate as to certain of the details.

The first part of the petitioner's actual confession demonstrates that the Assistant District Attorney suggested a minimum of the answers (1438-1440). The petitioner was able to trace his extended and complicated automobile tour with the victim and remembered well the time interval involved (1446, 1459). He even named the streets that he drove along (1440, 1448-1450). It was only when the prosecutor attempted to ascertain at what point the petitioner first decided to have intercourse with Sunday Graham (1450), or why he wrapped the belt around her neck (1461), that his memory became "hazy".

Examination of the inculpatory portion of the petitioner's statement (1437-1461) compels the irresistible conclusion that the petitioner was in full possession of all his mental faculties while he recounted his travels and his actions on the afternoon of the crime. Petitioner, however, to support his argument that he "adopted the suggestions" made to him (p. 10, petitioner's brief), seizes upon several of his answers where he "guessed" (1440), "assumed" (1459) or "believed" (1455) what he had done, or as to what "must have" happened (1450), as indicating that his mind was "unclear".

In fact, many of his answers were quite articulate and evidence that the petitioner fully grasped the significance of his conduct the day before and the import of his confession:

> "Q. Well, how long after you picked her up at the school did this happen? A. I don't know. Twenty minutes or a half hour or so.
>
> Q. About twenty minutes to a half hour after you picked her up from the school? A. Yes.
>
> Q. All right, now, after you finished inside of her what did you do? A. Took her belt and put it around her to stop her from fighting and going on." (1444)
>
> * * *
>
> "Q. Where did you drive? A. I just drove around. I remember coming off Babylon Turnpike. I remember coming on through Hempstead. Just headed towards Mineola.
>
> Q. All right, and then what happened? A. And I rode out by Mitchel Field, through that area to Uniondale Avenue, and come back around Mitchel Field and went down where those warehouses are over there, and that's where I left her.
>
> Q. About what time did you leave her in back around Mitchel Field? A. About 5 o'clock.
>
> Q. About 5 o'clock in the afternoon? A. About. That is judging from the time I noticed when I got over to Mineola." (1445-1446)
>
> * * *

"Q. And when you picked her up in the car what did you intend to do, when you picked her up in the car? A. I didn't recognize her—I didn't see her at first. Then I just recognized her and she ran up to my car and I stopped and I said Hi, and she said Hi, and I said, 'Come on, are you going home?' She said yes. Then she said, 'Well, daddy is home. Don't take me home.' I said, 'O.K.. I'll take you near home.' And then we started riding." (1449)

H.

That petitioner's confessions were procured by "the marathon interrogation * * * conducted by changing personnel."

The petitioner, his crimes, and the circumstances of his confessions, all stand clearly forth in the record. In sum, the petitioner, a criminal with long experience in denying guilt, and with better than average education and above normal intelligence, confessed—not from coercion or pressure—but freely and voluntarily.

As pointed out (p. 15, *supra*) the questioning of the petitioner, as a suspect in connection with the investigation of Sunday's murder, did not actively commence until about 9:00 P. M. While it is true that he was questioned by several police officers [by Captain Closs (264), by Detective Stark and Lieutenant Cummings (564-565) and finally by Chief of Detectives Pinnell in police headquarters (567-568)] before he was interviewed by the prosecuting attorney, the questioning was not at all continuous. Chief Pinnell's questioning, for example, ended about 4:30 A. M. (568). The petitioner was not again questioned until he began to give his statement to the Assistant District Attorney at 5:10 A. M. (568, 1384). Moreover, there were additional intervals during which he was not questioned, e.g., the visits by Mrs. Graham (266) and by Curtis Maddox

(267). Thus, the total period during which questioning was conducted, prior to the first confession, was approximately eight and one-half hours.

But the petitioner compares his detention to the situations presented in *U. S. ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (2d Cir.), cert. denied 350 U. S. 896, and *U. S. ex rel. Wade* v. *Jackson,* 256 F. 2d 7 (2d Cir.), cert. denied 357 U. S. 908.

In the *Caminito* case the delay in arraignment was forty hours, yet the Court pointed out, pages 700-701:

> "* * * the unlawful detention for many hours * * * would [not] suffice to vitiate the confessions as unconstitutionally obtained."

In the *Wade* case the Court concluded, page 11:

> "* * * the undisputed facts and the inadequate explanations made by the State are sufficient to show that by violence and harassment Wade's statements were finally extracted from him against his will because he could resist no longer and he knew there was no other way to bring an end to his ill treatment."

In short, the Court of Appeals found as a fact that Wade had been beaten in the manner that he had testified. Here, however, the petitioner took the stand not, as Wade did, to testify that he had been brutally struck, but to offer a defense based on "mental disorder".

Even this defense was not without question. The testimony of Dr. D'Angelo, called in rebuttal by the prosecution, brought out the fact that petitioner was able to coherently relate the details of his crimes during his examination by the psychiatrist (1007). Dr. D'Angelo concluded that the petitioner was not even suffering from any nervous condition—let alone any mental illness—and was in contact with reality at all times (1005).

The same factual situation presented here was faced, upon the trial, by the experienced attorneys who repre-

sented the petitioner. They were confronted with a client who had shaken hands with each of his "torturers" just before he confessed. As neither violence, nor false promises, nor duress were used in any manner to coerce his confessions, no reasonable claim could have been advanced in this direction. The other assertions which the petitioner now makes to this Court, in his effort to be released from responsibility for his crimes, are no less unreasonable. Rejection of them is amply justified by the evidence in the record.

CONCLUSION

The order and judgment of the New York Court of Appeals should be affirmed in all respects.

Respectfully submitted,

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